

FLEXCOM's Standing Committee on Financial Issues established a subcommittee to offer responses and recommendations to the California Law Revision Commission's Tentative Recommendation, dated May 2005, regarding Enforcement of Judgments under the Family Code. The participating members of this subcommittee are: Peter M. Walzer, Debra Frank, Lynette Robe, Arnold Freedland, Commissioner Keith Clemens (Ret.) and Raymond R. Goldstein. The subcommittee's responses and recommendation follow.

The California Law Revision Commission has correctly observed, and sought to rectify, the inconsistent treatments of enforceability periods between the various types of monetary and property awards that may be ordered pursuant to the California Family Code.

The Commission stated that the following three rules currently govern the period for enforcement of a judgment under the Family Code:

- (1) A judgment for support is enforceable until paid in full.
- (2) A judgment for possession or sale of property is subject to the ten-year enforcement period and renewal procedure provided by general enforcement of judgments law.
- (3) All other judgments are enforceable at any time, subject to the discretion of the court.

While we believe that the commission has correctly stated the prevailing law with regard to the first two 'rules', we are less convinced about the third. Notwithstanding our different analysis of this final rule, we wholeheartedly agree with the Commission that legislation should be introduced unifying the treatment of Family Law awards as related to Renewal of Judgment law and enforceability periods.

Our analysis of the Commission's Tentative Recommendation (dated May 2005) begins by examining the various types of awards issued in family law proceedings. In addition to orders concerning marital status, paternity, custody, visitation and injunctive relief, none of which are the subject of these recommendations, family law court awards may generally be classified into one of three categories, examples of which follow:

- **Support Orders (actual, 'add-ons' and 'in the nature of')**
  - Child, Spousal, Family
  - Health & Life Insurance premiums
  - Medical & Dental reimbursements
- **Division of Real & Personal Property**
- **Non-Support, Monetary Orders**
  - Equalizing awards re division of community property
  - Liabilities to Third Parties (credit cards, loan repayments, non-support tuition)
  - Attorney fees & costs

## **Support Orders**

The Commission's statement that Support Orders are 'enforceable until paid in full' finds unequivocal support under Family Code section 4502. Section 4502 entitled “*Renewal of Support Order Judgment. Allowed but not Required*”, presently states:

**(a) Notwithstanding any other provision of law, a judgment for child, family, or spousal support, including a judgment for reimbursement that includes, but is not limited to, reimbursement arising under Section 17402 or other arrearages, including all lawful interest and penalties computed thereon, is enforceable until paid in full and is exempt from any requirement that judgments be renewed.**

**(b) Although not required, a judgment described in subdivision (a) may be renewed pursuant to the procedure applicable to money judgments generally under Article 2 (commencing with Section 683.110) of Chapter 3 of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure. As provided in subdivision (a), the option of renewing the judgment has no effect on the enforceability of the amount due. An application for renewal of a judgment described in subdivision (a), whether or not payable in installments, may be filed:**

**(1) If the judgment has not previously been renewed as to past due amounts, at any time.**

**(2) If the judgment has previously been renewed the amount of the judgment as previously renewed and any past due amount that became due and payable after the previous renewal may be renewed at any time after a period of at least five years has elapsed from the time the judgment was previously renewed.**

**(c) In an action to enforce a judgment for child, family, or spousal support, the defendant may raise, and the court may consider, the defense of laches only with respect to any portion of the judgment owed to the state.**

It should be noted that the phrase 'enforceable until paid in full', in and of itself, does not have the plain meaning one would necessarily expect since at least two courts have stated that the lack of an express legislative intent to exclude the defense of laches was indicative of the Legislature's intent to specifically allow for such a defense. *In re Marriage of Plescia* (1997) 59 Cal.App.4th 252 [69 Cal.Rptr.2d 120]. Since *Plescia*, some courts have continued the application of a laches defense, even extending it to child support, while others disapprove of such an interpretation.

Thus, in 2002, the Legislature amended Section 4502 explicitly precluding the defense of laches to a support obligation, except those obligations that have been assigned to the state. Still unclear in this regard is whether this laches amendment constitutes a substantive change in the law, or merely a procedural one, thereby governing whether said amendment is applied retroactively, or only prospectively. Review of this important issue is presently pending before the California Supreme Court in the case of *In re Marriage of Fellows*, (2004) 121 Cal. App. 4th 607.

## **Division of Real & Personal Property**

The Commission's statement regarding the necessity of renewing property division order finds equal support in Family Code section 291, entitled "*Periods of Enforceability and Renewal*," which presently reads:

**A judgment or order for possession or sale of property made or entered pursuant to this code is subject to the period of enforceability and the procedure for renewal provided by Chapter 3 (commencing with Section 683.010) of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure.**

As illuminated in the 2004 case of *In re Marriage of Wilcox*, 124 Cal.App.4<sup>th</sup> 492; 21 Cal.Rptr. 3d 135, there exists an inherent inequity whereby a spouse must renew his or her property order to extend enforcement beyond 10 years, but, the other spouse need not comply with the same renewal requirements in order to enforce the reciprocal order for payment of a community property equalization obligation.

As discussed below, we will recommend that this statutory scheme be amended in order to bring simplicity, uniformity and equity to enforcement of Family Law Awards.

## **Non-Support, Monetary Orders**

We part ways with the Commission's analysis that Family Code Section 290 stands for the proposition that Non-Support, Monetary Orders, such as those for equalization obligations, are "enforceable at any time, subject to the discretion of the court." (See page 1, lines 13-14, and related footnote 6, of the Commission's Tentative Recommendation dated May 2005.)

We believe that a plain reading of current Family Code § 290, as well as the vast majority of cases discussing this section<sup>1</sup>, fairly interprets the language as providing a court with the discretion to employ various and broad *remedies* regarding the *enforcement* of existing Family Code orders, but not a basis for determination as to the underlying order's enforceability period.<sup>2</sup> As recited in *Marriage of Cordero* (2002) 95 Cal.App.4th 653 [115 Cal.Rptr.2d 787], "Family Code section 290 merely counts the ways in which a support order 'may be enforced' and says the court may make any other order as the trial court 'in its discretion' may be 'necessary.' "

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<sup>1</sup> And its predecessor, Civil Code § 4380.

<sup>2</sup> Interestingly, and notwithstanding CLRC's 1999 comment to the 2000 amendment of 290, it appears the court's rare use of '290' type language to support limited defenses stems from *Messenger v. Messenger* (1956) 46 Cal.2d 619 [297 P.2d 988], interpreting Civil Code section 139, the precursor to Family Code 290, twice removed. Referring to a 1951 amendment to C.C. 139, the *Messenger* court said, "... a provision was added that orders thereunder 'may be enforced by the court by execution or by such other order or orders as in its discretion [the trial court] may from time to time deem necessary.' Under this provision the trial court now has discretion to determine in each case whether execution is an appropriate remedy for enforcing its order. In the present case the court found on sufficient evidence that to permit the issuance and enforcement of a writ of execution would discredit defendant professionally and impair his ability to make the monthly payments and discharge the arrearages."

Presently, Section 290, entitled, “*Methods of Enforcement*,” reads:

**Subject to Section 291, a judgment or order made or entered pursuant to this code may be enforced by the court by execution, the appointment of a receiver, or contempt, or by any other order as the court in its discretion determines from time to time to be necessary.**

However, regarding Non-Support, Monetary orders, we do note a substantial confusion regarding Renewal procedures and therefore, enforceability periods, as a result of the interplay between Code of Civil Procedure § 683.310 and Family Code § 4502. Code of Civil Procedure section 683.310, entitled, “*Chapter No[t] Applicable to Judgments or Orders Under Family Code*,” presently states:

**Except as otherwise provided in the Family Code, this chapter does not apply to a judgment or order made or entered pursuant to the Family Code.**

As a practical matter and from personal experience, some court clerks charged with the duty of issuing Renewals of Judgments, often interpret C.C.P. § 683.310, as disallowing Renewals of Judgment for Non-Support, Monetary Orders. Such an interpretation is not unreasonable when the section is read as neither requiring compliance with, *nor offering the advantages of*, the Renewal Chapter. A clerk's position is further bolstered by C.C.P. § 683.310's exception clause referencing the Family Code, which only in section 4502, permits Renewals for Support. Presently, though, the Family Code is silent as to permitting Renewals for Non-Support, Monetary orders.

Therefore, we are left with a statutory scheme that exempts Non-Support, Monetary Orders from the 10 year limitation period, but, so too are these judgment creditors unfairly precluded from availing themselves of the Chapter's valuable benefits by use of the Renewal process. These benefits include (1) the ability “to freshen” an order for purposes of interstate or foreign enforcement; (2) a straightforward, court sanctioned mechanism of placing a debtor on notice that the debt remains, allegedly, owed (as well as providing related contest remedies available to the debtor in response thereto); and (3) combining of accrued principal and accrued interest into a new lump-sum judgment amount.

## **PUBLIC POLICY**

In its Tentative Recommendation, the Commission has aptly noted both the economic dynamics and familial concerns that distinguish Family Law Judgments from other civil money or property judgments. The Commission's Policy analysis also discusses practical and logistical reasons that Family Law Judgments can suffer from delayed enforcement, including the often tangled emotional web that exists long after judgment is entered, affecting relationships, children, and, of course, the nuts of bolts of judgment enforcement.

For all the reasons stated herein, and under the Policy Analysis section of the Tentative Recommendation, we too, concur, that simplicity and uniformity should be brought to all Family Law awards with regard to renewal requirements and rights.

## **RECOMMENDATIONS**

While we support the Commission's amendments in principal, we recommend a different statutory implementation, still accomplishing the intended results, but with a minimum of disruption to these historically complex statutes and related case analyses. In this regard, we suggest, (1) minor clean-up language to section 290; (2) repeal of section 291, in toto; and (3) extension of Renewal exemptions and rights to non-support awards, within section 4502. Unrelated to Renewals of Judgment, we also recommend amendments, as discussed below, to C.C.P § 695.221.

Specifically, we recommend:

1. All Family Law Orders (and judgments), whether for sale or possession of property, equalization awards, attorney fees, support or other awards, be exempt from the 10 year Renewal requirements.
2. All Family Law Orders be *entitled* to optional Renewal rights, at the creditor's prerogative.
3. Continue present law with laches being *unavailable* as a defense to non-assigned support obligations, while allowing its assertion to non-support, family law awards<sup>3</sup>. (In this way, our proposed language differs from the Commission's proposed language of section 291, whereby the Commission's proposal allows laches to be *unavailable* to *any* non-assigned Family Code order.) A minority of the committee recommends reviving the defense of laches to support obligations, at least with regard to accrued interest.
4. Amend the existing sentence of 4502(b), "**As provided in subdivision (a), the option of renewing the judgment has no effect on the enforceability of the amount due.**" to more accurately reflect legislative intent that *failure* to renew has no effect on the enforceability of the amount due. While a Renewal is not prima facie evidence that the renewed debt remains owed, it is not accurate to state that the renewal itself has no effect on the enforceability of amount owed. For example, by its very nature, a renewal affects the amount owed by combining principal and interest into one lump sum. As another example, relating to certain equitable arguments, the court may consider as relevant the fact that a debtor was given notice of an alleged debt vis-a-vis the renewal process.
5. Regarding the Commission's requested comments (see page 9, lines 36-39 of the Tentative Recommendation), and although not incorporated into the proposed statutory language set-forth herein, we see no reason that the Commission's simplified proposal to the renewal section not be amended to "An application for renewal of a judgment described in subdivision (a) may not be filed if the judgment was renewed at any time in the preceding five years." If amended in this way, we do suggest a comment that said amendment is not a substantive change to the law.

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<sup>3</sup> We believe that by allowing a laches defense to non-support orders (both monetary and property), courts will properly evaluate the equities of allowing enforcement on a case by case basis. In this way, a court may consider the creditor's knowledge of the law and ability to enforce, say, for example, when the creditor is an attorney to whom a direct fee award was rendered, versus a similar order payable to the family law litigant herself. And, distinct from money awards which are not generally payable from a specific 'pot,' property awards often relate to a specific piece of personal or real property, making enforcement and defenses thereto more appropriate for a court's equitable remedies.

6. Regarding the Commission's requested comments to Code of Civil Procedure section 580, we believe that such an amendment **could adversely** affect a Family Law litigant's ability to enforce their order, and therefore, we do not endorse such an amendment. While not all possible effects have been analyzed, one instance of where the proposed amendment would curtail family law remedies would be when a support creditor, for example, sought to utilize the enforcement remedies contained within Code of Civil Procedure section 708.410, et. seq. These sections provide that a judgment creditor may file a *lien on a pending court action* in order to seek enforcement against their debtor's right to receive money in a separate, but pending action. This remedy applies equally whether the debtor's action lies in a limited or unlimited civil action.
7. On an unrelated topic, we suggest the Commission support legislation repealing the recently enacted amendment to C.C.P. § 695.221. In 2009, if not amended, this section will dictate that, in non-welfare cases (and aside from limited exceptions), money paid toward satisfaction of a support obligation is applied in the following order:
  - i. Current Support
  - ii. Principal reduction
  - iii. Accrued Interest

The premise upon which 695.221 was amended, which premise we believe to be flawed, was ostensibly, that by providing debtors a more favorable payment application scheme, they would be encouraged to make voluntary payments toward past-due obligations. However, the "Collectibility Study," a report that examined child support arrears, prepared in March 2003 for the California Department of Child Support Services and cited in support of the former amendment, does not offer any empirical, nor even anecdotal evidence, to suggest that crediting principal before interest would encourage more payments. The report does state, however, that by reordering the payment application system, even without D.C.S.S. improving their collection efficiency, support arrears would be 6% less in 2010, than without amending the payment application system.

In reality, the purpose of amending section 695.221 was to reduce the accrual of child support arrearages that are "on the books" of the state of California, so as to maximize compliance with, and incentive funding from, the Federal Government.

Although we certainly cheer all efforts toward federal compliance and incentive capitalization, we think it should not be done at the expense of the support obligee. In fact, support debtors are *already* treated in a favorable fashion in that their payments are applied *first* to their current support obligation. Compare, for example, how one's mortgage or credit card debt is serviced, first applying money toward accrued interest, then to current charges and/or principal. What homeowner or credit borrower would not want their payments to reduce principal first? Of all debtors, should child support debtors be the first class to receive this preferred treatment? We think not.

Therefore, we believe the statutory changes made pursuant to AB 2669 (2004) which, among other things, amended section 695.221, should be reversed and the payment application scheme should return to its former enactment, namely, current support first, then interest and then principal. Otherwise, this law represents a significant course reversal whereby a support creditor is inferior to

almost any other kind of money judgment creditor and support debtors are given preferential treatment.

8. On a final, unrelated topic to the requested comments, but in the interests of justice and to reduce fraud, litigation, misunderstandings and other inequities, we believe that family law litigants would be well served by receiving a required information sheet telling them important information regarding support obligations. Assuming the continued preclusion of laches in support cases, it is all the more important that obligors be advised of certain rights and practices which may protect their interest in the future. Similarly, obligees who have been on the losing end of a laches or other equitable defense argument, whether in support or non-support cases, can be benefited by knowing certain rights and good practices to protect their interests. Therefore, we recommend enactment of a statute that requires the promulgation of a mandatory information sheet and distribution of this form to every family law litigant whenever the court makes or modifies a family law order or judgment. The single best method of distribution of this Information Sheet has not yet been determined. A sample draft of such an Information Sheet is attached.

## **PROPOSED AMENDMENTS**

### **FAM. CODE § 290. (amended). Methods of Enforcement**

~~Subject to Section 291, a~~ A judgment or order made or entered pursuant to this code may be enforced by the court by execution, the appointment of a receiver, or contempt, or by any other order as the court in its discretion determines from time to time to be necessary.

### **FAM. CODE § 291. (repealed). Periods of Enforceability and Renewal**

~~A judgment or order for possession or sale of property made or entered pursuant to this code is subject to the period of enforceability and the procedure for renewal provided by Chapter 3 (commencing with Section 683.010) of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure.~~

### **FAM. CODE § 4502. Renewal of ~~Support Orders~~ Entered Pursuant to this Code; Judgment Allowed but not Required**

(a) Notwithstanding any other provision of law, any judgment or order entered pursuant to this Code, including, but not limited to, a judgment for equalization payments, attorney fees, costs, child, family, or spousal support, including a judgment for reimbursement that includes, but is not limited to, reimbursement arising under Section 17402 or other arrearages, including all lawful interest and penalties computed thereon, is enforceable until paid in full and is exempt from any requirement that judgments be renewed.

(b) Notwithstanding any other provision of law, a judgment or order for possession or sale of property made or entered pursuant to this code is enforceable until fully performed and is exempt from any renewal requirements.

~~(b)~~ (c) Although not required, a judgment described in subdivisions (a) and (b), may be renewed pursuant to the procedure applicable to money judgments generally under Article 2 (commencing with Section 683.110) of Chapter 3 of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure. ~~As provided in subdivision (a), the option of renewing the judgment has no effect on the enforceability of the amount due.~~ An application for renewal of a judgment described in subdivision (a), whether or not payable in installments, may be filed:

- (1) If the judgment has not previously been renewed as to past due amounts, at any time.
- (2) If the judgment has previously been renewed the amount of the judgment as previously renewed and any past due amount that became due and payable after the previous renewal may be renewed at any time after a period of at least five years has elapsed from the time the judgment was previously renewed.

~~(e)~~ (d) In an action to enforce a judgment for child, family, or spousal support, the ~~defendant~~ obligor may raise, and the court may consider, the defense of laches only with respect to any portion of the judgment owed to the state.

[COMMENTS: The inclusion of equalization payments, attorney fees, and costs in subdivision (a), is a nonsubstantive change since the Renewal Chapter commencing at C.C.P. § 683.010, et. seq., has, ab initio, excluded Family Code Orders from Renewal requirements, unless otherwise dictated by the Family Code. (See C.C.P. § 683.310.) And, the Family Code has never subjected any monetary order to Renewal requirements. However, subdivision (b) does constitute a substantive change in the law as orders for Sale or Possession of property were governed by Renewal requirements pursuant to former Family Code § 291. This amendment is not intended to affect a person's right to assert other equitable defenses which may exist in statutory or case law.]

### **C.C.P. §695.221. (amended) Crediting Satisfaction of Money Judgment for Support**

*[Editor's Note: Second of two duplicate sections. The instant section shall become operative on January 1, 2009.]*

Satisfaction of a money judgment for support shall be credited as follows:

(a) The money shall first be credited against the current month's support.

(b) Any remaining money shall be credited against the accrued interest that remains unsatisfied.

~~(b)~~ (c) Any remaining money shall next be credited against the principal amount of the judgment remaining unsatisfied. If the judgment is payable in installments, the remaining money shall be credited against the matured installments in the order in which they matured.

~~(e) Any remaining money shall be credited against the accrued interest that remains unsatisfied.~~

*(no other amendments recommended to this section)*



## *Important Information about your Court Order*

Almost all child support obligations and most spousal support obligations are subject to modification for installments that have not yet matured. The basis for such modifications include change of financial or other circumstances, change in visitation or custody, as well as many other factors. The court cannot order a retroactive modification. If you believe your order should be modified, either up or down, immediately seek the assistance of an attorney, the Department of Child support Services or your local family law facilitator's office within the courthouse. The following are some recommendations regarding issues that may affect your obligation to pay or receive money, in the future. An attorney can advise you further.

### **OBLIGOR**

(A person who is ordered to pay money.)

- 1.) Obtain an "Acknowledgment of Satisfaction of Judgment" from the Obligee once you have paid your entire obligation. You may obtain blank forms from the forms window at your local courthouse, or on the web. If the Obligee does not comply with your demand to furnish a signed Acknowledgment, you may ask the court to issue one. You may periodically request that the Obligee provide an Acknowledgment of Satisfaction of Matured installments, thereby proving that your obligation is current through a particular date.
- 2.) Until you have obtained a signed Acknowledgment of Satisfaction of Judgment, **never** discard any of your proof that you have paid money to the Obligee. Such proof would include cancelled checks, money order receipts, bank statements, etc. Although not recommended, if paying in cash, always obtain a signed receipt from the Obligee. Also, save copies of all correspondence you send, and those that you receive, regarding your obligation.
- 3.) Seek the advice of an attorney prior to entering into any agreement with the Obligee. In the event that you and the Obligee agree to modify your obligation, be sure to do so only in writing, signed by both parties with notarizations. Never enter into any oral agreements.
- 4.) Be sure that the Obligee always has a way of communicating with you, preferably in writing.
- 5.) If you do not pay what has been ordered, interest will be added and penalties may be charged.

### **OBLIGEE**

(A person who is entitled to received money pursuant to a court order.)

- 1.) Until the Obligor has completely satisfied his obligation, keep copies of documents regarding your obligation, including check copies, bank statements, correspondence (both sent and received), and everything else which reflects the payments the Obligor did, and did not, make.
- 2.) Seek the advice of an attorney prior to entering into any agreement with the Obligor. In the event that you and the Obligor agree to modify your obligation, be sure to do so only in writing, signed by both parties with notarizations. Never enter into any oral agreements.
- 3.) Even if the Obligor is not presently delinquent on his obligation, seek advice about creating a lien against any real property interests that the Obligor may have now, or may acquire in the future.
- 4.) Be sure the Obligor always has a way of communicating with you, preferably in writing.
- 5.) Don't sit on your rights. If an Obligor is not complying with their obligation, see an attorney.